

SERVED: December 14, 2006

NTSB Order No. EM-203

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 12<sup>th</sup> day of December, 2006

_____	)	
THAD W. ALLEN,	)	
Commandant,	)	
United States Coast Guard,	)	
	)	
	)	
v.	)	Docket ME-179
	)	
	)	
JOHN F. KILGROE,	)	
	)	
Appellant.	)	
_____	)	

**OPINION AND ORDER**

Appellant, pro se, seeks review of a decision of the Vice Commandant (Appeal No. 2655, dated January 9, 2006) affirming a decision entered by Coast Guard Administrative Law Judge Parlen L. McKenna on October 4, 2004, after a hearing held on March 30, 2004.<sup>1</sup> The law judge sustained the charge of "professional incompetence" on the basis that, "[f]rom January 10, 2003 to

<sup>1</sup> Copies of the decisions of the Vice Commandant (acting by delegation) and the law judge are attached. The Coast Guard filed a reply opposing the appeal.

March 10, 2003" appellant "was unable to safely perform his required duties as a Wiper while onboard the USNS SEAY." The law judge therefore ordered that the Wiper endorsement on appellant's U.S. Merchant Mariner's Document (MMD) be revoked.<sup>2</sup>

On appeal, appellant repeats arguments that he made in his appeal to the Vice Commandant. The facts in support of the Coast Guard's allegations of appellant's "professional incompetence," and, in particular, appellant's inability to perform his duties as a Wiper safely, are set forth in detail in the decisions of the law judge and the Vice Commandant. We have thoroughly reviewed the entire record in this matter, and we adopt, as our own, with one exception, the Vice Commandant's rationale for, and decision, affirming the law judge's revocation of appellant's Wiper endorsement.<sup>3</sup>

However, we think more needs to be said on the issue of notice. The Vice Commandant's analysis of this issue is the one

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<sup>2</sup> Appellant's MMD also has the following endorsements: (1) "OS," which stands for Ordinary Seaman, and (2) "SD(FH)," which stands for Steward's Department (food handler). The Coast Guard investigating officer argued before the law judge that appellant's entire MMD should be revoked, but the law judge found that the Coast Guard did not prove by a preponderance of the evidence that appellant is "professionally incompetent" to hold the "Ordinary Seaman" and the "Steward's Department" endorsements. The Coast Guard appealed this ruling to the Vice Commandant, but the appeal was rejected. Therefore, the only issue on the appeal before us is whether the record supports the revocation of the "Wiper" endorsement on appellant's MMD.

<sup>3</sup> To the extent we have not discussed other specific arguments raised by appellant on appeal, and not explicitly discussed in the Vice Commandant's decision, we have nonetheless considered them in the context of the record as a whole and found them to be without merit.

aspect of his decision that we do not embrace. Our review of the record makes it clear that appellant has consistently, both at the hearing and before the Vice Commandant on appeal, argued that he did not receive adequate notice of the specific factual allegations that support the general charge of professional incompetence. The Vice Commandant's decision on appeal, in relevant part, states:

In reading Respondent's pleadings in total, however, he arguably means that the Coast Guard violated his substantive and procedural due process rights because it did not plead specific instances of professional incompetence. That argument also fails because, after the Coast Guard amended its complaint, Respondent was on notice as to both the legal and factual basis under which the Coast Guard was proceeding.

Appeal Decision at 12. We think this does not squarely address the notice issue, for the amendment referenced by the Vice Commandant was merely to re-title, on March 11, 2004, the factual allegations section of the original February 23, 2004 complaint from "Factual Allegations-Incompetence" to read "Factual Allegations-Professional Incompetence." The remainder of the factual allegations section of the complaint remained unchanged, and stated:

1. The Respondent was dispatched to serve as a Wiper onboard the USNS SEAY for a period of 4 to 6 months.
2. From January 10, 2003 to March 10, 2003, the Respondent was unable to safely perform his required duties as a Wiper while onboard the USNS SEAY.

We disagree with the Vice Commandant that changing the

descriptive title of the factual allegations in the complaint from "Incompetence" to "Professional Incompetence" addresses the gravamen of appellant's complaint that he did not get notice of what, exactly, the Coast Guard believed demonstrated he executed his duties aboard the USNS SEAY in a professionally incompetent manner. However, we have considered the issue carefully, and we think that this record demonstrates that appellant did, in fact, have adequate actual notice of the factual predicates for the charges against him. On March 17, 2004, Administrative Law Judge Parlen McKenna issued his scheduling order, which noticed the hearing for March 30, 2004, and instructed, among other things, that the parties serve upon the other no later than 10 days before the hearing "a list of your witnesses with testimony summaries and copies of all exhibits[.]" The Coast Guard, in compliance with the law judge's order, served upon appellant, on March 19, 2004, copies of all exhibits and summaries of expected testimony that demonstrated the factual details regarding the allegation of professional incompetence. Specifically, we note that these materials contained affidavits and other materials associated with a prior related labor case in which appellant participated, as well as a copy of a performance evaluation from appellant's supervisor aboard the USNS SEAY describing in detail appellant's poor performance aboard the USNS SEAY, and email correspondence from Robert Wood, Chief Engineer aboard the USNS SEAY, describing his perceptions of appellant's poor performance aboard the USNS SEAY. Under the circumstances, we conclude, for

reasons different than the Vice Commandant, that appellant was provided actual and legal notice of the charges against him.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Appellant's appeal is denied; and
2. The decision of the Vice Commandant, affirming the law judge's order revoking the Wiper endorsement of appellant's merchant mariner document, is, to the extent consistent with this opinion, affirmed.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN and HIGGINS, Members of the Board, concurred in the above opinion and order. Member HERSMAN submitted the following concurring statement.

**Member Hersman, Concurring**

Although I agree with the outcome of this appeal, I feel compelled to express disappointment in the U.S. Coast Guard's procedural handling of this case. The Coast Guard's boilerplate complaint provided no details or facts from which the appellant could formulate a defensive argument. The appellant could only discern the specific basis for the complaint from the administrative law judge's scheduling order. Because his actual notice then came from this secondary filing, his time to respond was significantly shortened, from about three weeks to 11 days. It is not unusual for respondents in civil enforcement cases to appear pro se, as the appellant did in this case, so it is all the more important for the prosecuting Federal agency to present enough information in its complaint to allow the respondent the full amount of time allowed by law to work on his or her defense.